FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1704 & 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

and

WILLIAM W. WILKINS TAX COMM'R FOR THE STATE OF OHIO, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1516 H STREET, N.W.
WASHINGTON, D.C. 20036
(202) 463-5337
Counsel for Amici Curiae

CHARLES A. TROST
Counsel of Record
MICHAEL G. STEWART
WALLER LANSDEN DORTCH & DAVIS, PLLC
511 UNION STREET, SUITE 2700
NASHVILLE, TN 37219-1760
(615) 244-6380

Becker Gallagher Legal Publishing, Inc., 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE COURT OF APPEALS' DECISION ADVANCES A POLICY AGENDA THAT IS NOT MANDATED BY THE COMMERCE CLAUSE AND THAT IS GROUNDED IN A FUNDAMENTAL MISUNDERSTANDING OF THE GLOBAL NATURE OF THE COMPETITION FOR HIGH-WAGE JOBS . . . 4

II. CONSISTENT WITH ORIGINAL INTENT BEHIND THE COMMERCE CLAUSE, THIS COURT HAS PROPERLY DRAWN A DISTINCTION BETWEEN LAWS WHICH EFFECT UNCONSTITUTIONAL TARIFFS AND SIMILAR TRADE BARRIERS AND LAWS WHICH MERELY DECREASE THE COST OF DOING BUSINESS WITHIN A GIVEN TAXING STATE 14

A. This Court's Commerce Clause jurisprudence is grounded in an economically meaningful distinction between protectionist trade barriers and lawful in-state efforts to create a favorable business climate 17

B. The court of appeals' holding departs from the original purpose of the Commerce Clause . . 22

C. The court of appeals' holding necessitates a formalistic distinction between credits and subsidies 23

III. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Associated Industries of Mo. v. Lohman,
511 U.S. 641 (1994) 17

Bacchus Imports, Ltd. v. Director of Taxation,
468 U.S. 263 (1984) 20-21

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,
486 U.S. 888 (1988) 26

Boston Stock Exchange v. State Tax Comm'n,
429 U.S. 318 (1977) 15, 17

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1996) 15, 28

Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 24

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1992) 29

Cuno, et al. v. Daimler Chrysler, Inc., et al,
386 F.3d 738 (2004) 15, 16, 21, 24, 25

Dean Milk Co. v. Madison,
340 U.S. 349 (1951) 17

Fulton Corp. v. Faulkner,
516 U.S. 325 (1994) 15, 17, 22

Goldberg v. Sweet,
488 U.S. 252 (1998) 25

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 15, 25

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 28

Moorman Manufacturing Co. v. Bair,
437 U.S. 267 (1978) 15, 19, 20, 28

New Energy Company of Indiana v. Limbach,
486 U.S. 269 (1988) 14, 17, 23, 25

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 22

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 4, 26, 27, 28, 29

United States v. Lopez,
514 U.S. 549 (1995) 10

West Lynn Creamery v. Harris,
512 U.S. 186 (1994) 23, 24

Westinghouse Electric Corp. v. Tully,
466 U.S. 388 (1984) 4

OTHER AUTHORITIES

Bureau of Labor Statistics, State Average Annual Wages for 2001-2002 (visited December 1, 2005) <http://www.bls.gov/cew/state2002.txt> 11

Bush Bernard, *Smyrna Nissan plant to add Pathfinder SUV*, THE TENNESSEAN, June 26, 2003, at 1A 12

Bill Carey, *Force of Runyon's personality lured Nissan to Tennessee*, THE TENNESSEAN (Nashville), May 9, 2004 12

Jorge Carrillo, *Transactional Strategies and Regional Development; The Case of GM and Delphi in Mexico*, JOURNAL OF INDUSTRY STUDIES 127 (2004) 9

Economic Development and the Dormant Commerce Clause: The Lessons of Cuno v. DaimlerChrysler and Its Effect on State Taxation Affecting Interstate Commerce, Joint Hearing Before Subcomm. on the Constitution and Subcomm. on Commercial and Administrative Law, 109th Cong., 1st Sess. 27 (2005) . . 7

ECONOMICS AND BUSINESS GROUP CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE (2005) (available at www.cargroup.org/pdfs/AIAMFinal.PDF) 8, 11, 12

Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) . 6, 13, 17-18

THOMAS FRIEDMAN, THE WORLD IS FLAT; A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Strauss and Giroux 2005) 10

Clayton P. Gillette, *Business Incentives, Interstate Commerce, and the Commerce Clause*, 82 MINN. L. REV. 447 (December 1997) 12-13, 18

GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th Ed. 1991) 22

Danny Hakim, *For a G.M. Family, the American Dream Vanishes*, N.Y. TIMES, November 19, 2005 10

PAUL J. HARTMAN AND CHARLES A. TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2d (2003) 28

Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (May 1996) 24, 25, 27-28

JOHN HUMPHREY AND OLGA MEMODOVIC, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THE GLOBAL AUTOMOTIVE INDUSTRY VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES (2003) (available at www.unido.org/file-storage/download/?file-id=11902) 8, 9

Charles E. McClure, Tax competition; is what's good for the private goose also good for the public gander?, 39 NAT'L TAX J. 341 (1986) 18

THE FEDERALIST No. 42 (James Madison) 22-23

Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997) 27

JUAN CARLOS MORENO BRID, MEXICO'S AUTO INDUSTRY AFTER NAFTA; A SUCCESSFUL EXPERIENCE IN RESTRUCTURING?, WORKING PAPER #232 (1996) (available at http://www.nd.edu/~kellogg/WPS/232.pdf) 8

Arundhati Parmar, *GM growth might bring 180 workers*, FORT WAYNE (Indiana) JOURNAL-GAZETTE, November 19, 2005 11

Keith Phillips et al., *Gauging the Impact of the San Antonio Toyota Plant*, VISTA – SOUTH TEXAS ECONOMIC TRENDS AND ISSUES (Federal Reserve Bank of Dallas, San Antonio Branch, San Antonio, TX), Spring 2004 (available at http://dallasfed.org/research/vista/vista0401.pdf) . 8, 9, 13

Keith Russell, *Transfers, local hires to have shot at high-end jobs*, THE TENNESSEAN (Nashville), November 11, 2005 12

Philip Tatarowicz and Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (May 1986) 14-15

THE PADUCAH (Kentucky) SUN, May 20, 2005 12

Ken Thomas, *Auto industry, lawmakers watching S. Ct. on tax incentive case*, ASSOCIATED PRESS, September 28, 2005 11-12

INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the briefs of Petitioners is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Chamber of Commerce of the United States of America is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and State courts throughout the country on issues of national concern.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the State chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Area Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,700 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee, as well as in States in Circuits other than the Sixth Circuit, and will thereby hinder industrial development in those States.

SUMMARY OF THE ARGUMENT

The Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* in support of the briefs of Petitioners.

Amici urge this Court to reject Respondents' anti-incentive political agenda, which is based on an ill-informed and outdated understanding of the global economic forces central to business investment decisions in today's economy.

Contrary to Respondents' assertion, this Court cannot free the States from the competition for business investment because that competition is global, not national. Incentives are not part of a zero-sum game pitting States against each other, but a tool used by States to compete effectively with Canada, Mexico and other nations to attract major capital investments which strengthen the United States economy as a whole.

This Court should analyze this case in light of its existing Commerce Clause jurisprudence, which sensibly draws a distinction between unlawful trade barriers and lawful credits, subsidies, and other purely intra-state activities which make an adopting State an attractive place to do business without placing burdens on interstate trade. That distinction is economically meaningful because, while it prevents the creation of trade barriers which impede commerce and impoverish the nation, it allows the creation of incentives, like the tax credits at issue, which have the aggregate effect of lowering costs for intra-state and interstate businesses alike. Grounded in an analysis of economic effects, this Court's existing analytical framework does not require the sort of tortured, formalistic reasoning that the court of appeals necessarily employed in its effort to distinguish Ohio's investment tax credit from run of the mill business subsidies that this Court has long recognized as constitutional. This Court's existing jurisprudence, moreover, carries out the clear intent of the Framers, who created the Commerce Clause to prohibit protectionist tariffs, not to solve what Respondents perceive to be the problem of low aggregate tax rates for businesses. This Court should apply its existing Commerce Clause doctrine to validate the statute at issue, an incentive which lowers the cost of doing business in Ohio without imposing any barrier to goods and services provided in interstate commerce. The Court should reject the Respondents' self-described "novel legal theory" that the

Commerce Clause prohibits laws which affect interstate commerce by making a State attractive to business investment.

To the extent Respondents can assemble empirical support for their view that incentives are bad public policy, they should bring that evidence to the attention of Congress. That body is empowered to create a national policy regarding business incentives that balances the obvious and overwhelming benefits generated by major capital investments like the DaimlerChrysler facility at issue against the perceived, albeit unproven, economic inefficiencies and other costs that Respondents claim such incentives impose on the States. As in *Quill Corp. v. North Dakota*, this Court should reverse the court of appeals' decision, leaving to Congress a clear path for such action as Congress may deem prudent and necessary. 504 U.S. 298 (1992).

ARGUMENT

I. THE COURT OF APPEALS' DECISION ADVANCES A POLICY AGENDA THAT IS NOT MANDATED BY THE COMMERCE CLAUSE AND THAT IS GROUNDED IN A FUNDAMENTAL MISUNDERSTANDING OF THE GLOBAL NATURE OF THE COMPETITION FOR HIGH-WAGE JOBS.

This Court has long recognized that each State has broad authority to craft tax laws to meet the particularized needs of its citizens and, accordingly, that application of the Commerce Clause requires a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing power." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984). The court of appeals' decision upsets this balance, radically expanding the reach of the Commerce Clause anti-discrimination principle to usurp States' authority in the area of business tax incentives. In so

doing, the court of appeals has signed on to a very particular policy agenda, in effect substituting the economic prepossessions of a self-selected group of consumer advocates and legal academicians for the judgment of the elected representatives of the people of Ohio. An examination of the assumptions underlying the anti-incentive agenda promoted by the Respondents and embraced by the court of appeals reveals that it is based on an outdated understanding of the global economic forces that confront State actors charged with the responsibility to attract and maintain high-wage jobs and business investments for the benefit of their constituents. As such, it provides a textbook example of the sort of impractical, ill-informed policy that often results when interest groups use the courts to avoid the deliberative, analytical processes necessary to effect economic policy through legislation.

The central assumption underlying Respondents' agenda is that States use incentives like Ohio's investment tax credit to compete amongst themselves for a finite pool of investment capital and that, therefore, incentives provide no net gain for the national economy the Commerce Clause was designed to protect. As Respondents observed in their Brief in Response to Petition for Certiorari:

> [I]t has never been Respondents' intention to single out Ohio's incentive programs as distinctly problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, *Respondents anticipate that a clear statement of the unconstitutionality of discriminatory tax incentives will free all the states from the necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful advantage for none.*

Respondents' Brief in Response to Petition for Certiorari at 5-6, *DaimlerChrysler Corp., et al. v. Cuno* and *Wilkins v. Cuno* (Nos. 04-1704 and 04-1724) (emphasis supplied). Thus, Respondents and their academic supporters urge this Court to "save the states from themselves" by creating a "level playing field" on which they can compete for business investment. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 398 (1996) (making the empirically incorrect assertion that "the incentives competition is, for the States collectively, at best a zero-sum game ... the business that one state attracts is a business that would have gone to another state").

Respondents' arguments postulate an economy that no longer exists. The "playing field" on which States compete today for business investments is not the nation, but the world. Incentives are not part of a "zero-sum game" in which one State's gain is inevitably another's loss, with no aggregate benefit to the national economy. Rather, incentives allow States to compete with Mexico, Canada and other nations to attract valuable industries and thereby strengthen the economy of the entire nation. The likely result of Ohio not being able to offer incentives to DaimlerChrysler to create or keep jobs in Toledo as a consequence of this case is not that these jobs will migrate to Alabama or Georgia, but that they will likely go to an existing DaimlerChrysler plant in Canada, Mexico or Europe and leave the United States altogether. Conversely, plants that are successfully recruited in part with incentives are often obtained in competition with other countries and thus represent a net gain not only to the recruiting State but also to the nation's economy as a whole. As was stated by Ohio's Lieutenant Governor Bruce Johnson in testimony before Congress:

> We live in an increasingly global marketplace, where a company's very survival depends on its ability to be lean and efficient. This market demands that I be able to offer incentives in order for Ohio to compete against its regional neighbors; not only with other States, but also countries like Canada and Mexico. Case in point: Ontario, Canada, lists Ohio as one of its chief competitors, and offers at least nine tax incentives to encourage investment. You can find them on their website.
>
> * * *
>
> We believe the flexibility to put together aggressive, customized incentive packages is critical to securing these projects. Take for example projects like Lab One's $18.4 million expansion of its laboratory facilities in Cincinnati, or the United States Enrichment Corporation's decision to invest $1.1 billion creating 500 high-paying jobs in rural southern Ohio. Ohio won out over facilities in Asia and Mexico when the Whirlpool Corporation chose to invest $143 million in several Ohio facilities.

Economic Development and the Dormant Commerce Clause: The Lessons of Cuno v. DaimlerChrysler and Its Effect on State Taxation Affecting Interstate Commerce, Joint Hearing Before Subcomm. on the Constitution and Subcomm. on Commercial and Administrative Law, 109th Cong., 1st Sess. 27 (2005). Far from "sav[ing] the states from themselves," the court of appeals' decision hobbles the States in their ongoing efforts to compete in the global economy.

The forces of global competition are particularly fierce in the automotive industry at the center of this lawsuit. In the past two decades, automotive manufacturers have expanded beyond their historic national bases of operation, constructing

major production facilities around the globe. Major Asian and European manufacturers—BMW, Honda, Mercedes, Mitsubishi, Nissan, NUMMI, Subaru-Isuzu and Toyota—have all built plants in the United States. ECONOMICS AND BUSINESS GROUP CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE (2005) (available at http://www.cargroup.org/pdfs/AIAMFinal.PDF) (prepared for the Association of International Automobile Manufacturers, Inc.). At the same time, U.S., European and Asian manufacturers have dramatically expanded their presence in Mexico. JOHN HUMPHREY AND OLGA MEMODOVIC, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THE GLOBAL AUTOMOTIVE INDUSTRY VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES, 7 (2003) (available at http://www.unido.org/file-storage/download/?file_id=11902); *see also* JUAN CARLOS MORENO BRID, MEXICO'S AUTO INDUSTRY AFTER NAFTA; A SUCCESSFUL EXPERIENCE IN RESTRUCTURING?, WORKING PAPER #232 (August 1996) (available at http://www.nd.edu/~kellogg/WPS/232.pdf) (describing Mexican operations of major producers). Thus the decision to locate an automotive production line is now made by international companies that can readily evaluate the costs and competing benefits offered by the many States and nations in which they conduct business.

This competition for automotive investment is especially acute in North America, where the Mexican auto industry has risen over the past decade to directly challenge the United States at every level of production. As one study recently observed, there is now an "auto corridor that extends from Mexico City to Atlanta." Keith Phillips et al., *Gauging the Impact of the San Antonio Toyota Plant*, VISTA – SOUTH TEXAS ECONOMIC TRENDS AND ISSUES (Federal Reserve Bank

of Dallas, San Antonio Branch, San Antonio, TX), Spring 2004 (available at http://dallasfed.org/research/vista/vista0401.pdf). GM, Ford, DaimlerChrysler, Nissan, VW Group and Honda all have major assembly plants operating in the Mexican portion of that corridor. HUMPHREY & MEMODOVIC, *supra*, at 7. Total employment at these Mexican facilities—652,000 in 2002—rivals employment in the top six automotive-producing States—Michigan, Indiana, Ohio, Kentucky, Illinois and Tennessee, which was 670,000 during the same period. Phillips, *supra*. Qualitatively, the Mexican auto industry has transformed itself from a low cost parts producer to a direct competitor employing "sophisticated product design, development and research" to manufacture finished vehicles. Jorge Carrillo, *Transactional Strategies and Regional Development; The Case of GM and Delphi in Mexico*, 11 JOURNAL OF INDUSTRY STUDIES 127 (2004). Reflecting this transformation, Mexico's total exports of vehicles rose from 18,245 to 1.8 million between 1980 and 2001—with ninety percent exported to North America. HUMPHREY & MEMODOVIC, *supra*, at 11. State economic development officials working to attract and preserve automotive jobs must therefore labor with an ever-present awareness that a robust competitor with ties to virtually every major manufacturer offers a realistic, low cost alternative site for virtually every potential plant or production line—an even more viable alternative since the advent of the North American Free Trade Agreement, which precludes tariff barriers among the three North American signatories. *Id.* at 10 (noting that the "NAFTA Agreement created the basis for much deeper integration" of member states' automotive industries).

Global competition is hardly a secret or obscure phenomenon. A decade ago, this Court noted that "[i]ncreasing global competition has ... made primary and

secondary education economically more important. The portion of the American economy attributable to international trade tripled between 1950 and 1980." *United States v. Lopez*, 514 U.S. 549, 621 (1995). International competition is now an ever-present topic in the popular press and even the focus of best-selling books. *See, e.g.*, Danny Hakim, *For a G.M. Family, the American Dream Vanishes*, N.Y. TIMES, November 19, 2005, at A2 (noting that "domestic automakers and suppliers are fighting to survive brutal global competition"); THOMAS FRIEDMAN, THE WORLD IS FLAT; A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 117 (2005) (generally describing increasing global competition and noting the "process of competitive flattening, in which countries scramble to give companies the best tax breaks, education and subsidies ... to encourage offshoring to their shores"). Yet to read Respondents' briefs one would have no idea that the phenomenon of global competition even exists. This omission is particularly startling when one considers the precise issue in this case—the validity of incentives offered to induce a German company with automotive assembly plants on three continents to invest in the United States. Respondents' opposition to incentives is grounded in an assumption that States are competing solely with each other and that this Court has the power to "free all the states from the necessity of engaging in an escalating competition." Respondents' Brief in Response to Petition for Certiorari, *supra*, at 6. The reality is that the States' fiercest competitors for plants like the DaimlerChrysler facility at issue are in other nations beyond this Court's jurisdiction. Respondents' failure to grasp this central reality of today's economy upends the entire logical framework underpinning Respondents' arguments and underscores what a poor substitute academic commentators are for legislators in the arena of economic development.

Tax incentives offered to automotive manufacturers are a reasoned response by States not only to the intense global competition for investment but also to the extraordinary benefits generated by that particular industry. A facility like DaimlerChrysler's Jeep plant in Toledo, in and of itself, can be the linchpin which lifts thousands of families into the middle class. On average, a job in one of the automobile assembly plants established in the United States by international manufacturers pays $59,000 in salary and benefits—nearly twice the average wage in States directly affected by the court of appeals' decision. CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR, *supra*, at 13; Bureau of Labor Statistics, State Average Annual Wages for 2001-2002 (visited December 1, 2005) <http://www.bls.gov/cew/state2002.txt>[2]. Moreover, jobs in automotive plants are a small fraction of the total employment created by such investments. For each direct hire at an automotive assembly plant, on average 9.4 additional jobs are created at automotive suppliers and other businesses. *Id.* at 18.

Even these geometric increases in employment have proven to be just the tip of the iceberg of economic benefits accruing to those States that have successfully recruited major automotive investments. In State after State, initial investments in a single plant have generated years of expansions and additional, related investments. In Ohio, for example, Honda's small initial investment in a 64-employee motorcycle plant in 1979 paved the way for four plants representing a capital investment of $6.3 billion and employing 16,000 people. Ken Thomas, *Auto industry,*

---

[2] Domestic manufacturers also offer very high-wage jobs. Average pay for GM's hourly workers, including benefits, was $74.00 per hour in 2004. Arundhati Parmar, *GM growth might bring 180 workers*, FORT WAYNE (Indiana) JOURNAL-GAZETTE, November 19, 2005, at B9.

lawmakers watching S. Ct on tax incentive case, ASSOCIATED PRESS, September 28, 2005. In Kentucky, Toyota's original 1985 investment of $800 million in a single assembly plant for 200,000 vehicles per year has expanded to a $4.5 billion plant producing 435,000 vehicles per year and employing 7,000 people. One Kentucky newspaper recently editorialized that "this one industrial recruiting success did more for the state than the entire agendas of other governors." THE PADUCAH (Kentucky) SUN, May 20, 2005. In Tennessee, Nissan's initial U.S. manufacturing facility, attracted in 1980 with a $30 million incentive package, has entirely transformed the State's economy, spawning the location of more than 950 parts plants collectively estimated to employ 33% of the State's manufacturing workforce. Bush Bernard, *Smyrna Nissan plant to add Pathfinder SUV*, THE TENNESSEAN, June 26, 2003, at 1A. Nissan itself has since opened an additional Tennessee manufacturing plant and increased its Tennessee employment from 2,200 in 1980 to approximately 8,000 in 2005. Bill Carey, *Force of Runyon's personality lured Nissan to Tennessee*, THE TENNESSEAN (Nashville), May 9, 2004, at 4E; Keith Russell, *Transfers, local hires to have shot at high-end jobs*, THE TENNESSEAN (Nashville), November 11, 2005, at 10A. All told, investments by international automotive companies in the United States had, by 2003, created 55,000 direct jobs and generated investment of over twenty-two billion dollars in the U.S. economy. CONTRIBUTION OF THE INTERNATIONAL AUTOMOTIVE SECTOR, *supra*, at 4.

Respondents question whether such substantial, long term economic benefits justify the cost of incentives like Ohio's investment tax credit, but tellingly present no conclusive empirical evidence to support their claims. At best "[e]mpirical studies that seek to evaluate [Respondents'] allegations are inconclusive." Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*,

82 MINN. L. REV. 447, 452 (December 1997). Certainly, the States that actually compete for investments believe that incentives are an effective and, indeed, essential tool for attracting automotive plants and similar facilities. And practical experience seems to bear out the theory, put forward by some commentators, that incentives, far from harming the national economy, actually assist in the rational allocation of resources therein. *Id.* at 448. The States that have provided substantial incentive packages, like Ohio, Tennessee and Kentucky, because of their existing automotive supplier base, have been the States that have stood to derive particularly significant economic benefits from automotive sector investment because the presence of suppliers substantially enhances the jobs multiplier effect of such direct investment. Phillips, *supra*. Those States also have larger numbers of low-wage workers in desperate need of high-paying jobs, while lacking some of the attributes, like ocean ports, natural resources, and established high-tech research communities, that drive the economies of many high-wage States that have not seen the need to provide similar incentive packages.

Proponents of Respondents' anti-incentive agenda have cautioned against "[a]ttributing to state political actors an unrealistic reservoir of both information and economic rationality." Enrich, *supra*, at 402. But Respondents' failure to acknowledge the global nature of the competition for jobs strongly suggests that the single court-mandated economic policy they promote would be neither optimal nor rational. To the extent the Respondents can assemble a coherent body of evidence to demonstrate that incentives are in fact bad economic policy, they should present that evidence to Congress or to the State legislatures that are best equipped to evaluate such evidence in light of countervailing evidence and in a position to react appropriately to changing economic and societal conditions. In the meantime, this Court should

decline Respondents' invitation to strait-jacket States with an outdated policy that has long been rendered irrelevant by the rapidly-changing world economy.

II. CONSISTENT WITH ORIGINAL INTENT BEHIND THE COMMERCE CLAUSE, THIS COURT HAS PROPERLY DRAWN A DISTINCTION BETWEEN LAWS WHICH EFFECT UNCONSTITUTIONAL TARIFFS AND SIMILAR TRADE BARRIERS AND LAWS WHICH MERELY DECREASE THE COST OF DOING BUSINESS WITHIN A GIVEN TAXING STATE.

In its unanimous decision in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), this Court succinctly articulated the thrust of its longstanding approach to business incentives under the Dormant Commerce Clause:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

In cases in which this Court has evaluated State business incentives under the Commerce Clause's anti-discrimination principle, it has consistently adhered to this central distinction between discriminatory trade barriers and non-discriminatory incentives which merely lower the cost of doing business in a given State. As many commentators have observed, this Court has consistently struck down as discriminatory those statutes that have imposed tariff-like barriers to interstate sales and movements or otherwise penalized taxpayers for engaging in interstate commerce. *See* Philip M. Tatarowicz and

Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 928 (May 1986). By contrast, this Court has upheld statutes which have merely "encourage[d] the growth and development of intra-state commerce and industry" through measures, like direct subsidies or apportionment schemes favorable to in-state businesses, which simply lower the cost of doing business in a taxing State without burdening interstate transactions. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977); *see, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976)(upholding subsidy); *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978)(upholding single factor apportionment scheme).

In striking down Ohio's investment tax credit, the court of appeals rejected the notion that this distinction embodied in this Court's decisions creates a principled rule of law:

> The defendants maintain that the Supreme Court's opinions should be read narrowly to hold that tax incentives ... are permissible as long as they do not penalize out-of-state economic activity...*In their view, the Commerce Clause is primarily concerned with economic protectionism* – that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce...*Although it is arguably possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court has not adopted this approach. . .*

Cuno, et al. v. Daimler Chrysler, Inc., et al., 386 F.3d 738, 745 (2004) (emphasis supplied). Of course, this Court *has* repeatedly stated that the Commerce Clause was designed as a "barrier against protectionism." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1996); *see also, Fulton Corp. v. Faukner*, 516 U.S.

325, 330 (1994). Nevertheless, the court of appeals abandoned this Court's focus on protectionist measures in favor of the virtually limitless test for discrimination urged by the Respondents, holding that the Ohio credit is unconstitutional because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states." *Cuno*, 386 F.3d at 745.

This Court should reject the court of appeals' unbridled expansion of the Commerce Clause in favor of its existing framework for at least three reasons. First, this Court's longstanding distinction between protectionist burdens on interstate commerce and purely intra-state incentives is economically meaningful because it protects interstate trade while leaving States free to reduce tax burdens on in-state businesses. Because this Court's approach is grounded in an analysis of the economic effects, it provides a workable test with discernable limits to courts' supervision of the nation's economy. Second, this Court's focus on protectionist trade barriers is consistent with the intent of the Framers, who enacted the Commerce Clause in response to interference with interstate commerce—protectionist tariffs. Third, this Court's existing Commerce Clause jurisprudence properly requires no artificial distinction between subsidies and tax credits, which are economically equivalent and should be treated alike for tax purposes. While Dormant Commerce Clause jurisprudence has been criticized as inconsistent, in the area of business incentives a workable rule consistent with original intent has emerged. That rule should be applied to the Ohio tax credit at issue—a purely intra-state incentive that imposes no trade barrier burdensome to businesses outside that State.

A. This Court's Commerce Clause jurisprudence is grounded in an economically meaningful distinction between protectionist trade barriers and lawful in-state efforts to create a favorable business climate.

The decision of the court of appeals expands the concept of Commerce Clause discrimination into an entirely new economic realm. To date, this Court has only used the negative Commerce Clause to strike down statutes which have had a particular effect on the nation's economy—creating direct or indirect barriers to trade. As this Court observed in *Fulton Corp.*:

> In its negative aspect, the Commerce Clause "prohibits economic protectionism – that is 'regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors.'"

516 U.S. at 330 (quoting *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy*, 486 U.S. at 273-74)). A classic example of such a protectionist burden is that struck down in *Boston Stock Exchange*—a transaction tax which increased when part of the targeted transaction, the sale of a share of stock, occurred outside the taxing State in interstate commerce. 429 U.S. 318 (1977). As the Court noted, the effect of such taxes, if replicated nationally, would be to make interstate trade artificially expensive and thereby hinder trade among the States—to "'invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Id.* at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The economic effect of intra-state incentives like the Ohio investment tax credit is entirely different. A credit or subsidy awarded to in-state companies merely reduces the cost of doing business in a given State. Replicated nationwide, such

business incentives have the primary effect, as critics of incentives have observed, of reducing businesses' aggregate tax rates. Enrich, *supra*, at 387. To the extent such laws have an incidental effect on interstate commerce, it is to promote such commerce by "driv[ing] down the level of state taxation of mobile capital to its economically optimal level." *Id.* at 401 (paraphrasing Charles E. McClure, *Tax competition: is what's good for the private goose also good for the public gander?*" 39 NAT'L TAX J. 341, 341-43 (1986)). While some academic commentators might view low business tax rates as a social problem, it is clearly a different "problem" than protectionist trade barriers—the sole problem at which the Commerce Clause is directed.

The significance of the economic distinction inherent in this Court's anti-discrimination cases is effectively illustrated by an example developed by Professor Clayton P. Gillette—the competition by law schools for qualified professors. Gillette, *supra*, at 482. As Professor Gillette notes, law schools use incentives, such as pay and benefits, to lure law professors from law schools in other States. This practice is designed to influence, and undoubtedly does influence, interstate commerce, but one "would be surprised to hear anyone claim that B State ought to be constrained by the Commerce Clause from bidding for Professor A's services." *Id.* By contrast, few would be surprised if the Commerce Clause were invoked to strike down a requirement that professors teaching in a given State be graduates of that State's law schools or pay a tax not levied on graduates of those schools. The difference lies in the effect of such policies on the national economy. Just as business incentives have an aggregate effect of creating a favorable low tax business climate, the competition to offer salaries and benefits to law professors has the effect of creating a favorable employment environment which in the aggregate benefits all

professors. By contrast, a discriminatory tax or prohibition against professors from out-of-state law schools imposes, like a tariff on goods, costs on law professors as a group, hindering their movement to the States in which they are in greatest demand and thereby impoverishing the law teaching profession and the nation. Tax incentives like Ohio's investment tax credit affect commerce in precisely the same way as a high salary offer to a law professor, a well-engineered bridge or a low aggregate corporate income tax rate – by making a State an attractive place to do business. Such government activities erect no barrier to interstate commerce, however, and have never been deemed discriminatory by this Court.

In one case, this Court specifically applied these principles to a tax incentive statute designed to make a State attractive to business investment by lowering the income taxes of in-state taxpayers and held that the incentive did not run afoul of the Commerce Clause. *See Moorman Manufacturing*, 437 U.S. 267 (1978). In *Moorman Manufacturing*, this Court evaluated Iowa's single factor income-tax apportionment scheme, which apportioned income to Iowa based on a taxpayer's in-state sales, without consideration for in-state property and payroll. *Id.* The effect of the single factor apportionment scheme is to reduce taxes on businesses with property and payroll in Iowa as compared with States using the more typical three factor apportionment formulas, which apportion tax based on in-state sales, property and payroll. This Court rejected any notion that Iowa's business-friendly tax scheme violated the Commerce Clause:

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay tax on a greater portion of its

> income than a local Iowa company, and an Iowa company doing business in Illinois will pay tax on less of its income than an Illinois corporation doing business in Iowa. *The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes, and Iowa is not responsible for the latter.*

Id. at 278, n. 12 (emphasis supplied). The same logic applies to Ohio's investment tax credit, to a low corporate tax rate, or to a well-paved road. To the extent such business-friendly governmental actions attract or influence interstate commerce, it is not because they impose a discriminatory trade barrier but because they have created favorable business conditions. Should other States choose to replicate the favorable conditions, taxes or other burdens on businesses will be reduced. Should they choose not to provide equivalent business conditions, any resultant disparity will proceed from that decision, not from any discrimination inherent in one State's passage of laws designed to attract business with apportionment rules, low tax rates, or other provisions favorable to business operations.

Because this Court has never suggested that incentives which benefit businesses by simply reducing their tax burden are, by virtue of that reduction, discriminatory, the Respondents are forced to divorce the language in this Court's Commerce Clause cases from its economic context to construct support for their challenge to Ohio's investment tax credit. It is certainly true, as Respondents note, that this Court has stated that the Commerce Clause prohibits taxes which "[provide] a direct commercial advantage to local businesses" and noted that "[t]he determination of

constitutionality does not depend on whether one focuses on the benefited or the burdened party." *Bacchus Imports, Ltd. v. Director of Taxation*, 468 U.S. 263, 273 (1984). But such statements only have meaning if viewed in the context that they were made. *Bacchus* involved a tax scheme which effectively created a tariff on liquor produced outside Hawaii by exempting local producers from a generally-applicable tax. *Id.* at 273. Unsurprisingly, this Court, noting that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of ... discriminatory purpose," determined that such a scheme was protectionist and unconstitutional. *Id.* at 270. The fact that the scheme was structured as a "benefit"—an exception from tax effectively available only to local producers—did not make it any less a trade barrier. *Id.* at 271.

By separating *Bacchus* from its economic context—from the plainly protectionist effect of the tariff effectively created by Hawaii's liquor tax scheme—the court of appeals has abandoned this Court's Commerce Clause jurisprudence for an unworkable rule of law that has no discernible or justifiable limits. If, in fact, any law which provides a "benefit" to businesses and thereby attracts investment to a State violates the Commerce Clause, then virtually any tax credit, subsidy, low tax rate, business friendly apportionment scheme, or, for that matter, road, convention center or other investment designed to make a State attractive to business violates the Constitution. The court of appeals' concern that "the economic effect of the Ohio tax credit is to encourage further investment in-state at the expense of development in other states" would apply with equal force to any of these activities. *Cuno*, 386 F.3d at 745. Such a standard would run directly contrary to this Court's holding in *Moorman Manufacturing*. More fundamentally, it would defy common sense and detach this Court's Commerce Clause

jurisprudence from its longstanding economic moorings. Having created a body of case law which establishes an economically meaningful standard for discerning unconstitutional protectionist legislation, this Court should reject the court of appeals' unprincipled departure from that standard.

B. The court of appeals' holding departs from the original purpose of the Commerce Clause.

In distinguishing between unlawful trade barriers and lawful intra-state incentives, this Court has carried out the intent of the Framers. As this Court has observed, striking down protectionist tariffs

> effectuates the Framers' purpose to 'prevent a State from ... jeopardizing the welfare of the Nation as a whole, as it would do *if it were free to place burdens on the flow of commerce across its borders* that commerce wholly within those borders would not bear.'

Fulton Corp., 516 U.S. at 330 (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)) (emphasis supplied). The central purpose of the Commerce Clause was to eliminate such "burdens on the flow of commerce," which had plagued the States under the Articles of Confederation. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th Ed. 1991) (emphasizing that "[t]he national Commerce Power, it was hoped, would put an end to ... protective tariffs on imports from other states"). As James Madison observed:

> [t]he defect of power in the existing Confederacy to regulate the commerce between its several members is ... clearly pointed out by experience. ... *A very material object of [the power to regulate foreign commerce] was the relief of the States which import*

> *and export through other States, from the improper contribution levied upon them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.*

THE FEDERALIST No. 42 (James Madison) (emphasis supplied). This Court's application of the Commerce Clause's anti-discrimination principle thus addresses the particular economic problem that Madison and the other authors of the Constitution designed that Clause to solve. The court of appeals' interpretation of the Commerce Clause strains to address a very different issue—the reduction and elimination of taxes on businesses. While whether reducing taxes on business through incentives of the sort at issue is wise public policy may be open to debate in the legislative context, low taxes on business were simply not an issue that concerned the Framers. Accordingly, it has no relevance to the issue in this case.

C. The court of appeals' holding necessitates a formalistic distinction between credits and subsidies.

The court of appeals' analysis necessarily requires this Court to abandon its focus on the economic substance of challenged legislation and adopt a formalistic distinction between subsidies and other, equivalent economic development incentives such as tax credits. This Court has long recognized "that direct subsidization of domestic industry does not ordinarily run afoul of the negative Commerce Clause." *West Lynn Creamery v. Harris*, 512 U.S. 186, 199, n. 15 (1994) (quoting *New Energy*, 486 U.S.

at 278); *see also*, *Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (noting that a town could avoid a burden on interstate commerce by directly subsidizing a private solid waste operation). In striking down Ohio's investment tax credit, the court of appeals concedes that "a direct subsidy ... would no doubt have the same economic effect" as the challenged credit. *Cuno*, 386 F.3d at 746. This is consistent with the analysis offered by Professor Hellerstein in the law review article cited by the court of appeals, in which he notes that "[e]conomists know that the real-world impact of such a subsidy mirrors the effect of the credit." Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 835 (May 1996). The court of appeals offers no legally coherent basis for distinguishing economically equivalent subsidies and credits other than the conclusory statement that "the distinction ... results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax"—in other words, taxes and subsidies are different because taxes are taxes and subsidies are subsidies. *Cuno*, 386 F.3d at 746.

The court of appeals' approach is a complete departure from this Court's historic application of the Commerce Clause, which "eschew[s] such formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201. True to that approach, this Court has never endorsed an artificial rule that subsidies are a distinct class of incentives that are excluded from scrutiny under the Commerce Clause. To the contrary, where subsidies have been used as part of a scheme designed to erect a trade barrier to interstate commerce by allowing in-state taxpayers to evade a facially neutral tax, this Court has not hesitated to strike down such schemes. *See West Lynn Creamery*, 512 U.S. 186 (1994). As this Court observed in

New Energy, subsidies that pass constitutional muster do so, not because of some special Commerce Clause doctrine applicable to subsidies, but because subsidies, by their nature, "are not generally 'connected with the State's regulation of interstate commerce.'" *Cuno*, 386 F.3d at 746 (quoting *New Energy*, 486 U.S. at 278). As Justice Stevens has observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry"—a principle that is not dependent on the form of method chosen; "*[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital*, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J. concurring) (emphasis supplied). This Court's treatment of subsidies is simply an expression of the Commerce Clause principles that inform its analysis of other incentives; protectionist tariff barriers are prohibited while statutes which simply lower the cost of doing business within a taxing State generally pass muster.

Commentators cited by the court of appeals have suggested that tax credits should be distinguished from subsidies because unlike subsidies they do not have to be budgeted and are therefore subject to less political scrutiny. *See, e.g.*, Hellerstein and Coenen, *supra*, at 847. Whatever the significance of this purported distinction from a public policy standpoint, it has nothing to do with the proper application of the Commerce Clause. "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1998). To the extent that citizens of a State become concerned that their legislators enact tax credits too readily, they can effectively address that problem through the political process.

III. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES.

This Court should take into consideration the "substantial reliance" by countless industry and public officials on longstanding tax incentives and properly "leave essentially legislative judgments to the Congress" regarding the benefits and burdens on interstate commerce created by such incentives. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-898 (1988) (Scalia, J., concurring in Judgment). This Court could follow the fair and prudent course set by it in *Quill*, 504 U.S. at 298. In *Quill*, this Court was called upon to address whether the Due Process Clause and Commerce Clause prohibit States from taxing out-of-state mail-order vendors. *Id.* The Court reversed its earlier precedent with respect to the Due Process issue, but, noting that existing precedents had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," the Court declined to reverse its longstanding Commerce Clause position that mail-order businesses could not be taxed by States in which they had no substantial physical presence. *Id.* at 317. Important to this Court's determination was the recognition that

> [t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

Id. at 318. Would it therefore not be better that this Court similarly consider the reliance interests of manufacturers who have invested substantial sums induced to do so by significant tax incentives and hold that incentives of the sort at issue do not run afoul of the Dormant Commerce Clause?

Certainly, the reliance interests implicated in this case are far weightier than those protected by this Court in *Quill*. *Quill* involved a single industry; the court of appeals' decision in this case calls into question a vast framework of incentives relied on by manufacturers operating in virtually every State in the Union. *See* Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997).

As in *Quill*, this Court should reverse on substantive grounds the court of appeals, reinstate the district court decision, and leave to Congress the task of balancing these extensive reliance interests, as well as the significant economic benefits that have motivated State legislatures to adopt the incentives on which industries now rely, against the anti-tax incentive policy agenda advocated by the Respondents. While this case does not involve a question of law to which this Court has directly spoken as did *Quill*, it does involve an issue as to which informed taxpayers could have reasonably inferred from this Court's precedents that tax incentives such as those at issue were well within acceptable limits set under the Commerce Clause, and made informed investment decisions in reliance on those references. The Respondents concede that this Court's Dormant Commerce Clause jurisprudence does not directly mandate the court of appeals' decision to strike down the most commonly available type of business tax incentive in the United States. *See* Walter Hellerstein, *supra*, at 805. Indeed, the Respondents themselves characterize their position as a "novel legal

theory." (No. 01-3960, *Cuno v. DaimlerChrysler Corp.* (6th Cir.), Pl. Br. at viii).

This Court has recognized that "novel legal theor[ies]" of State taxation with broad national application are best tested, evaluated and promulgated by Congress. *Quill*, 504 U.S. at 318 (refusing to adopt an "economic" rather than "physical" presence Commerce Clause nexus requirement); *Moorman Manufacturing*, 437 U.S. at 278-280 (refusing to mandate a formula for apportionment of income of multi-state enterprises on the grounds that such action would necessitate "extensive judicial lawmaking"); *see also*, *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 620 (Thomas, J., dissenting) ("the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce ... and leaves to Congress the policy choices necessary for any further regulation of interstate commerce"). As in *Quill* and *Moorman*, this Court should decline Respondents' invitation to impose such a novel legal theory on the States by judicial fiat and thereby avoid opening the Pandora's Box of when and to what extent application of the novel theory must, cannot, should, or should not be given retrospective effect. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *see also*, HARTMAN AND TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D, § 7.5, pp. 64-104 (2003) (analyzing cases addressing the validity of claims for retroactive relief in tax cases).

Business development incentives are an area of law particularly suited to Congressional action. Unlike this Court, which must address the issue from the narrow perspective of the specific facts and statute at issue, Congress can create a national scheme which broadly addresses such incentives in the totality of their various iterations and circumstances,

either by allowing them, or banning them entirely, or placing all or certain types of incentives in protected safe harbors.[3] Not only would such a Congressionally mandated scheme place States in all Circuits on an equal footing, but it would immediately increase the value of those incentives to both the States and the businesses that rely on them by eliminating the legal uncertainty created by the decision of the court of appeals. Congress is also in a unique position to address the interests of those businesses that have made substantial investments in reliance on such incentives, often after evaluating opportunities in many competing States and nations. To the extent Congress agrees with the Respondents that, irrespective of the opinion of legislatures throughout the United States, certain incentives are bad public policy and place an unreasonable burden on interstate commerce, it can readily enact "grandfather" or "sunset" provisions carefully tailored to preserve tax benefits for which businesses have already bargained in good faith.

A decision of this Court reversing the holding of the court of appeals on the ground that the Dormant Commerce Clause does not prohibit the incentive at issue will leave Congress, should it so choose, free to form a national policy on business development incentives. As this Court observed in *Quill*, "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that 'the better part of wisdom and valor is to respect the judgment of the other branches of the Government.'" *Quill*, 504 U.S. at 318-319 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1992)).

---

[3] A bill has been introduced in Congress to protect commonly used incentives, including credits for in-state investment of the sort challenged in this litigation, from Commerce Clause challenge. S. 2881, 109th Cong., 1st Sess. (2005).

CONCLUSION

For the foregoing reasons, and those set out in the briefs of Petitioners, this Court should reverse the court of appeals.

Respectfully submitted,

Charles A. Trost
Counsel of Record
Michael G. Stewart
WALLER LANSDEN DORTCH
& DAVIS, PLLC
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1516 H Street, N.W.
Washington, DC 20036
(202) 463-5337

Attorneys for the Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce & Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce
Amici Curiae